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In the Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC., PETITIONER

v.

LISA M. AVIGLIANO, ET AL.

LISA M. AVIGLIANO, PETITIONER

v.

SUMITOMO SHOJI AMERICA, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether respondents' complaint states a claim for relief under Title VII of the Civil Rights Act of 1964.

2. Whether a Japanese-owned company incorporated in the United States is a company of Japan for purposes of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan and therefore may invoke on its own behalf the privilege conferred by Article VIII of the Treaty on nationals and companies of Japan to engage certain personnel "of their choice" within the territories of the United States.

3. Whether, if the Court concludes that a Japanese-owned company incorporated in the United States is a company of Japan for purposes of the Treaty, including the Article VIII(1) privilege, the Court should decide in the absence of a factual record the manner in which the Article VIII(1) privilege is affected by Title VII of the Civil Rights Act of 1964.

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Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956) 9, 10, 25

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

SUMMARY OF ARGUMENT

1. Sumitomo errs in contending that the complaint should be dismissed because it challenges employment practices based on citizenship. The complaint explicitly

alleges discrimination on the basis of sex and national origin. In any event, this Court made clear in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), that Title VII prohibits discrimination on the basis of citizenship when it has the purpose or effect of discriminating on the basis of national origin.

2. Article VIII(1) of the Treaty with Japan confers on "[n]ationals and companies of either Party" a right to engage specified personnel of their choice "within the territories of the other Party." Thus, Sumitomo can invoke the Article VIII(1) employment privilege in the United States only if it is a company of Japan for Treaty purposes. The pertinent definitional provision of the Treaty, Article XXII(3), expressly provides, however, that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof." This provision makes clear that a company has the nationality of its place of incorporation. Because Sumitomo is incorporated in the United States, it is a company of the United States, and it therefore cannot invoke the Article VIII(1) employment privilege.

The conclusion that the Parties did not intend for enterprises incorporated in the United States but controlled by a Japanese company to invoke the Article VIII(1) employment privilege is reinforced by the fact that elsewhere in the Treaty the Parties expressly conferred rights on such controlled enterprises. Among the rights conferred on foreign controlled companies is the central protection of the Treaty in Article VII guaranteeing treatment no less favorable than that offered a domestically controlled enterprise. The negotiating history and subsequent interpretation of the Treaty also reflect the understanding of the contracting Parties that a company would have the nationality of the place of its incorporation, and the United States and the Ministry of Foreign Affairs of the Government of Japan both take that view at the present time specifically with regard to Article VIII(1).

3. If the Court nevertheless concludes that Sumitomo is a company of Japan for purposes of the Article VIII(1) employment privilege, it should not reach the issue of the relationship of that Article to Title VII of the Civil Rights Act. The court of appeals' attempted reconciliation of Article VIII(1) and Title VII through a relaxed "bona fide occupational qualification" ("BFOQ") exception in Title VII is analytically flawed; the appropriate defense to a citizenship requirement that has the *effect* of discriminating on the basis of national origin is that of "business necessity," not the BFOQ exception. Moreover, because the decisions below were rendered in connection with Sumitomo's motion to dismiss the complaint, there has not yet been an opportunity for the parties to develop or for the court to make factual findings on a number of significant matters that should inform the Court's resolution of the manner in which Title VII may affect a company's exercise of the Article VIII(1) privilege.

ARGUMENT

INTRODUCTION: TREATY TRADER VISAS

Article VIII(1) of the Treaty of Friendship, Commerce and Navigation (FCN) between the United States and Japan, Apr. 2, 1953, 4 U.S.T. 2070 confers on nationals and companies of Japan doing business in the United States a right to engage certain personnel of their choice. But where the persons of choice are Japanese nationals not resident in the United States, they cannot be employed in the United States unless they first are admitted pursuant to the "treaty trader" section of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(E)(i). That Section provides that an alien is entitled to enter the United States in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national." This statutory section implements

provisions in FCN Treaties such as that in Article I of the Treaty with Japan, which states that "[n]ationals of either Party shall be permitted to enter the territories of the other Party and to remain therein * * * for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities." [1]

The treaty trader provisions of this Article and the INA apply to an eligible alien whether or not his prospective employer in the United States is a national or company of Japan for purposes of the Article VIII(1) employment privilege. However, in issuing visas under 8 U.S.C. 1101(a)(15)(E), the State Department has required as an administrative matter that where the alien seeking a treaty trader visa will be employed by a trading firm, the majority ownership of the firm must be in persons having the nationality of the visa applicant. 22 C.F.R. 41.40(a)(2); 9 Foreign Affairs Manual (FAM), Pt. II, § 41.40 Note 16 (Feb. 20, 1975).

State Department regulations further require that the applicant for a treaty trader visa "will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity." 22 C.F.R. 41.40(a)(2); 9 FAM, Pt. II, § 41.40 Notes 10 and 13, § 41.41 Note 4. State Department instructions sent to consular posts on July 10, 1981, elaborate upon these requirements, based upon precedential materials in the State Department's files. App. A, *infra*.

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[1] Article I(b) further provides that nationals of one Party may enter the territories of the other "for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital." Aliens seeking to enter the United States for this purpose must qualify as a "treaty investor" under the 8 U.S.C. 1101(a)(15)(E)(ii). See also 8 U.S.C. 1101(a)(15)(L) (intra-company transfers).

The recent instructions stress that a position will be regarded as "executive" or "supervisory" for treaty trader purposes only if it is a top-level management position. Among the relevant factors are "the degree to which the applicant will have ultimate control and responsibility for the firm's overall operations or a major component thereof [and] the number and skill levels of the employees within his responsibility" (App. A, *infra*, 3a, ¶ 4).[2] The instructions explain that Congress did not intend for "minor managerial positions to be filled by alien workers when the position could be held by an American employee 'without placing in jeopardy the U.S. investment made by a foreign firm'" (*id.* at 5a, ¶ 7, quoting *Matter of Udawaga*, 14 I. & N. Dec. 578, 581 (1974)). In addition, it is necessary that the position the alien would occupy "principally requires management skills, or entails supervision over and key responsibility for a large portion of a firm's operation, and only incidentally involves substantive, day-to-day staff work related to the firm's type of business" (App. A, *infra*, 4a, ¶ 5).

An alien may obtain a treaty trader visa to occupy a position that is *not* executive or supervisory in nature only if he is a specialist who is "truly essential to the firm's operations in the U.S."; treaty trader status is not intended "as a channel for the importation of ordinary skilled workers" (App. A, *infra*, 6a, ¶ 8). The appropriate question for these positions, therefore, is "what is it that the foreign worker can do under the circumstances that an American worker cannot do or cannot be trained to do?" (*ibid.*). Moreover, it is expected that treaty trader aliens who do not occupy executive or supervisory positions will train Americans to assume their duties. *Id.* at 7a, ¶ 9; cf. 9 FAM, Pt. II, § 41.40 Note 10.2.

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[2] See also *id.* at 5a, ¶ 6 ("an applicant coming to head one of [the] operation's bureaus or departments (*e.g.*, accounting, loans, etc.) could probably be deemed destined to an executive or supervisory position and therefore entitled to E-1 issuance").

In sum, although the United States and Japan have interpreted the Treaty to preclude a Japanese-owned company incorporated in the United States from invoking the special employment privilege in Article VIII(1), the treaty trader section of INA has been applied administratively to employment with a broader range of firms—all those in which the majority ownership interest is held by persons having the nationality of the visa applicant, irrespective of the place of incorporation. Accordingly, as a wholly Japanese-owned trading company, Sumitomo may continue to obtain the services of Japanese nationals, to the extent they qualify for treaty trader visas under the standards described above, even if the Court concludes that Sumitomo is not a company of Japan that may invoke the special employment privilege in Article VIII(1) of the Treaty.

I. THE COMPLAINT SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

Sumitomo first argues (Br. 14-18) that respondents' challenge to the exercise of its purported right under Article VIII(1) of the Treaty to employ Japanese citizens fails because, under this Court's decision in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), discrimination on the basis of citizenship is not prohibited by Title VII. This contention fails to take account of the wording of the complaint and the actual holding in *Espinoza*.[3]

The first paragraph of the complaint explicitly states that this case "involves * * * national origin discrimination in employment." J.A. 6a. Count 2 of the complaint does refer to discrimination based on "nationality," but this does not necessarily mean citizenship. In *Griggs* v.

[3] This argument also is inconsistent with Sumitomo's answer of "no" to an interrogatory asking whether it has, since 1969, "utilized an employee's country of national origin, for example, *Japanese citizenship*, as a criterion for eligibility to hold certain jobs with the Corporation" (J.A. 44a) (emphasis added).

Duke Power Co., 401 U.S. 424, 436 (1971), for example, this Court used the term nationality as a synonym for national origin. Nor does the complaint refer to the Treaty, upon which Sumitomo relies in arguing that respondents actually challenge a citizenship requirement. Sumitomo first cited the Treaty in its answer, relying upon it as an *affirmative defense* to the allegations of discrimination. J.A. 82a.

In any event, Sumitomo errs in arguing that this Court's decision in *Espinoza* insulates all citizenship requirements from scrutiny under Title VII. Although the Court held in *Espinoza* that the term "national origin" in Title VII does not embrace citizenship requirements as such, it stressed that "certainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin" (414 U.S. at 92). Respondents should be given the opportunity to prove that Sumitomo's asserted citizenship requirement has such a purpose or effect. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).[4]

Independent of their claim of national origin discrimination, respondents also allege that Sumitomo "[d]iscriminat[es] against women by restricting them to clerical jobs" and "by refusing to train them or promote

[4] Among other things, respondents might be able to show that Sumitomo waives its citizenship requirement for American citizens of Japanese national origin and that the citizenship requirement therefore is being used as a pretext for national origin discrimination. *Espinoza*, *supra*, 414 U.S. at 92. Even without such evidence, respondents might be able to show that a Japanese citizenship requirement has the effect of selecting employees on the basis of national origin. Such a requirement would then violate Title VII unless Sumitomo could show as a factual matter that it is job-related (*id.* at 92-93; *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)) or unless Article VIII(1) of the Treaty is construed to constitute a legislative-type validation of the job-relatedness of the citizenship requirement for the particular positions involved. See page 26, *infra*. In addition, although respondents did not so allege in their complaint, because the population of Japan is racially homogeneous, it may be that a Japanese citizenship requirement would have the purpose or effect of discriminating on the basis of race by favoring orientals over others.

them to executive, managerial, and/or sales positions" (J.A. 9a). Sumitomo seems to assume that this claim must be limited to an assertion that Sumitomo prefers male citizens of Japan over female citizens of Japan, because it argues that while Reiko Turner, who is a Japanese citizen, states a claim of sex discrimination, the remaining respondents, who are American citizens, do not. This assumption is incorrect. The allegation that Sumitomo "discriminat[es] against women" (J.A. 9a) is certainly broad enough to encompass a claim that Sumitomo prefers all men, both Japanese and American, over all women. Indeed, Sumitomo's reports submitted to the EEOC for the years 1975 and 1976 indicate that it has hired some white males—presumably Americans—in the categories of "Officials and managers," "Professionals," and "Sales workers," but has hired no females in those categories. J.A. 61a, 67a. Consequently, all respondents have stated a claim of sex discrimination, not just respondent Turner.

II. SUMITOMO IS NOT A COMPANY OF JAPAN FOR PURPOSES OF THE TREATY, INCLUDING THE SPECIAL EMPLOYMENT PRIVILEGE IN ARTICLE VIII

Sumitomo claims unfettered discretion under Article VIII(1) of the Treaty to hire Japanese nationals to the exclusion of United States nationals for any or all the positions at issue here. A necessary premise of that claim is that Sumitomo is a "company of Japan" for purposes of the Treaty—since Article VIII(1) of the Treaty confers only on "[n]ationals and companies of either Party" the right to engage, "within the territories of the other Party," the specified personnel of their choice. The text and background of the Treaty make clear, however, that the nationality of a company is determined by the place of its incorporation. The Government of Japan consistently has taken this position, as reiterated most recently in an official communication by the Ministry of Foreign Affairs to the American

Embassy in Tokyo on February 26, 1982. App. B, *infra.* Sumitomo is a company of the United States under this test, and it therefore cannot avail itself of the employment privilege in Article VIII(1).

A. The Text of the Treaty

Article VIII(1) confers on "companies of either Party" the right to engage specified personnel of their choice "within the territories of the other Party." Article VIII does not, however, define the term "company." Nor does that Article establish a test for ascertaining the nationality of an enterprise for purposes of determining whether it is a company "of" one Party (in this case, Japan), such that it may invoke the right to engage employees of its choice within the territories of the "other Party" (here, the United States).

The definitional Article of the Treaty, Article XXII, performs both functions. Paragraph (3) of that Article, in its first sentence, defines "companies" to mean "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." The second sentence of Paragraph (3) in turn furnishes an explicit test for determining the nationality of such "companies" (emphasis added):

> *Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party.

Herman Walker—"the architect of the modern FCN treaty"[5] and adviser to the State Department on commercial treaties in the 1950s[6]—explained that under

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[5] *Spiess* v. *C. Itoh & Co. (America), Inc.*, 643 F.2d 353, 357 (5th Cir. 1981).

[6] Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956).

FCN treaty provisions such as Article XXII(3), "[a] 'company' is defined simply and broadly to mean * * * any 'artificial' person acknowledged by its creator, as distinguished from a natural person, * * *."[7] With obvious reference to the second sentence of Article XXII(3), Walker further explained that "[e]*very association meeting this simple test of valid existence must be accounted by the other party a company of the party of its creation,* and have its juridical status recognized without any reservation for the laws of the forum." Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int. L. 373, 380-381 (1956) (emphasis added; footnotes omitted).

Applying this explicit definition of nationality, it is clear that Sumitomo is, by virtue of its incorporation in New York, a company of the United States for purposes of the Treaty. The court of appeals therefore plainly erred in concluding that because Sumitomo is wholly owned by a Japanese company, "it is properly classified as a Japanese company for the purpose of invoking the substantive provisions of the Treaty, including Article VIII." Pet. App. 11a-12a. The simple place-of-incorporation standard in the FCN treaties was a deliberate departure from other tests of corporate nationality—including a control test of the sort adopted by the court of appeals—that were followed or suggested in other situations during the preceding several decades. Walker, *supra*, 50 Am. J. Int. L. at 381. Moreover, the intent of the Parties that a company's nationality would *not* be determined by the nationality of its owners is reinforced by other provisions of the Treaty that distinguish between nationals and companies of a Party and enterprises owned or controlled by such nationals and companies.

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[7] Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int. L. 373, 380 (1956). Walker referred to Article XXII(3) of the Japanese Treaty as exemplifying the standard definition of the term "company" in FCN treaties. *Id.* at 380 n.34.

Article VII is particularly instructive in this regard. Paragraph (1) of that Article confers on nationals and companies of one Party the right to open branch offices within the territories of the other Party or, alternatively, "to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party." The quoted language plainly contemplates that when a national or company of one Party organizes a company under the laws of the other or acquires a controlling interest in such a company, the controlled entity nevertheless remains a company "of such other Party"—*i.e.*, the Party under whose laws it was organized. Similarly, Article XVI(2) provides that articles "produced by nationals and companies of either Party within the territories of the other Party, *or by companies of the latter Party controlled by such nationals and companies*," shall be accorded treatment no less favorable than like goods of national origin. The emphasized language makes clear that an entity remains a company of one Party even when controlled by a national or company of the other. Similarly, Articles VI(4) and VII(4) and the last sentence of Article VII(1), discussed below (see page 13 note 9, *supra*), expressly confer rights on enterprises controlled by nationals and companies, as distinguished from the nationals and companies themselves.[8]

These provisions demonstrate that where the Parties intended to confer rights on enterprises controlled by nationals and companies of a Party as well as upon the nations and companies themselves, the Treaty expressly

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[8] Moreover, as Herman Walker explained, the place-of-incorporation test of corporate nationality is consistent with the treatment of a vessel, whose nationality is that of the flag it flies, not its owners. Art. XIX(2); see Walker, *supra* note 7, 50 Am. J. Int. L. at 382. This rule is consistent as well with the practice of United States courts of regarding a corporation as a citizen of the place of its incorporation. *Id.* at 382; see 28 U.S.C. 1332(c); *Steamship Co.* v. *Tugman*, 106 U.S. 118 (1882); *Thomas* v. *Board of Trustees*, 195 U.S. 207 (1904).

so provides. The failure of the Treaty to mention controlled enterprises in the first sentence of Article VIII(1) therefore establishes that such enterprises are not included among the entities that can assert the special employment privilege in that Article. See *Spiess* v. *C. Itoh & Co. (America)*, *supra*, 643 F.2d at 366-367 (Reavley, J., dissenting); see, *e.g.*, *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 6. This conclusion is especially compelling in view of the very next sentence of the same paragraph of Article VIII, which clearly distinguishes between companies of one Party and their enterprises within the territories of the other Party (emphasis added):

> Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations *exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.*

The court of appeals nevertheless concluded that a company such as Sumitomo should be deemed a company of Japan because the court found it "unlikely" that the Parties intended to grant each other broad rights in Article VII to establish and maintain subsidiaries and yet "to bar those same subsidiaries from invoking almost all of the substantive provisions which the Treaty contains" (Pet. App. at 8a). See also *Spiess* v. *C. Itoh & Co.*, *(America)*, *supra*, 643 F.2d at 358. Sumitomo echoes the same argument. Br. 36-37. With all respect, the court of appeals and Sumitomo have simply misunderstood the structure of the Treaty.

Contrary to the court of appeals' apparent belief, a Japanese-controlled company incorporated in the United

States has substantial protection under the Treaty even if it is not deemed a company of Japan. Article VII—"the heart of the treaty" (J.A. 130a)—explicitly provides in the last sentence of Paragraph (1) that enterprises within the territories of one party that are controlled by nationals and companies of the other "shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party." This provision ensures "national treatment" for Japan-controlled companies incorporated in the United States—*i.e.*, it places them on an equal footing with American-controlled corporations in the United States.[9] Such an approach is entirely consistent with the principle that a corporation is an artificial person, wholly the creature of the laws that authorize its formation. Accordingly, when Japanese nationals or companies choose to incorporate an enterprise under

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[9] In addition, Article VII(4) grants enterprises controlled by nationals and companies of one Party, like the nationals and companies themselves, most-favored-nation status in matters treated in Article VII. This guarantee is of importance where the host Party grants rights to foreign individuals and companies that it does not grant to its own.

The Treaty also carefully distinguishes between nationals and companies of a Party and enterprises in which such nationals and companies have an interest for purposes of protections against the taking of property. Article VI(3) provides that property of nationals and companies of one Party within the territories of the other cannot be taken except for a public purpose and unless just compensation is promptly paid. Article VI(4), in contrast, affords the enterprises only national and most-favored-nation treatment in such matters, without, *e.g.*, an explicit guarantee to the *enterprise* of just compensation. Paragraph 2 of the Protocol accompanying the Treaty (4 U.S.T. 2082) does protect the interest of nationals and companies in their enterprises, however, by stating that the provision for payment of just compensation extends to interests held by them "directly or indirectly" in property taken within the territories of the other Party. Once again, however, this is a right of the *parent*, not of the controlled enterprise itself. Compare the second sentence of Article VIII(1) discussed at page 12, *supra*; compare also Art. V(1).

the laws of the United States, it is appropriate that the enterprise be subject to the laws of the United States pertaining to such corporations generally and that it not benefit from any special privileges not available to nationals and companies of the United States, such as whatever protection from the operation of domestic law is afforded by Article VIII(1). In return, the foreign owners receive the benefit of limited liability for the corporation's operations, a distinct corporate presence in this country, and possibly certain tax advantages as well. Moreover, the national treatment provided by the Treaty furnishes appropriate assurance against discriminatory measures directed at the foreign-owned company that could adversely affect the favorable investment climate the Treaty was intended to create.

The court of appeals sought to minimize the significance of Article VII(1) and other provisions of the Treaty that confer rights specifically on enterprises in which nationals and companies have an interest by arguing that these provisions were intended simply to furnish *additional* rights beyond those which they would have merely as companies of Japan. Pet. App. 9a. This suggested explanation, however, ignores the fact that the rights granted to such enterprises are either the same as those granted to companies of Japan (*e.g.*, Art. VII(4); compare the first and last sentences of Art. VII(1); cf. Art. XVI(2)) or actually afford *less* protection than is given to such companies (*e.g.*, Art. VI(4)). See generally *Spiess* v. *C. Itoh & Co. (America)*, *supra*, 643 F.2d at 367 (Reavley, J., dissenting). Thus, the Parties' fashioning of distinct rights for controlled enterprises indicate that the Parties intended the rights of such enterprises to be limited to those separately conferred.

The court of appeals reasoned (Pet. App. 8a), however, that the Parties could not have intended to deny to Japanese-owned U.S. corporations certain other rights that are expressly conferred on nationals and companies of Japan. But as we have just explained there are entirely logical reasons for attaching significance to the

place of the incorporation of an artificial person; and, in any event, the principal protections of the Treaty *are* afforded to enterprises such as Sumitomo pursuant to Article VII. Moreover, most of the privileges that are granted to nationals and companies of the foreign state also would, as a practical matter, be enjoyed by the controlled enterprise by virtue of its receiving treatment equal to that of a domestically controlled corporation. See generally *Spiess* v. *C. Itoh & Co. (America)*, *supra*, 643 F.2d at 367-369 (Reavley, J., dissenting). But to the extent that there *are* differences in treatment depending upon the place of incorporation, there is every reason to believe that the Parties intended precisely that result. The court of appeals should not have reformulated the terms of the Treaty protection because of its own dissatisfaction with the pattern of rights it understood to have been conferred.

Another difficulty with the court of appeals' approach is that it does not yield a bright-line test for determining a company's nationality. Indeed, the court of appeals itself recognized that its approach would require a "case-by-case analysis of the relevant facts" to determine whether a company incorporated in the United States is "sufficiently 'Japanese'" to invoke the various substantive provisions of the Treaty. Pet. App. 11a n.4. Such an approach substantially undermines what was intended to be the principal advantage of the place-of-incorporation test—its simplicity. See Walker, supra note 7, 50 Am. J. Int. L. at 382 (referring to the "*simple* 'classical' test"; emphasis added); J.A. 157a-158a.

B. The Negotiating History and Subsequent Interpretation of the Treaty

The limited negotiating history, to which recourse properly may be had in interpreting the Treaty, *Neilson* v. *Johnson*, 279 U.S. 47, 52 (1929), strongly reinforces the plain meaning of the text, discussed above. Most revealing is a State Department airgram sent to the

American Embassy during the course of the negotiations, which stated (J.A. 145a-146a):

> Article XXII, Paragraph 3, * * * establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority of stockholders are disregarded.

Sumitomo, like the court of appeals (Pet. App. 11a), relies (Br. 38) on an excerpt from a memorandum of a conversation between American and Japanese negotiators regarding the second sentence of Article XXII(3). A Japanese representative inquired what the "recognition of juridical status mentioned in paragraph (3) meant" (J.A. 143a-144a). The American representative replied that this "meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party" (*id.* at 144a). Sumitomo apparently reads this brief exchange as an indication that the second sentence of Article XXII(3) was drafted for the sole purpose of ensuring the recognition of a company as a legal entity, without affecting the entity's substantive rights. Br. 37-38. This contention is simply wrong. The second sentence of Article XXII(3) has two distinct clauses: the first provides that companies constituted under the laws of one Party "shall be deemed companies thereof"; the second provides that such companies "shall have their juridical status recognized within the territories of the other Party." The exchange cited by Sumitomo obviously refers only to the recognition of juridical status addressed in the second clause. It does not even refer to the first clause of the sentence, which states the place-of-incorporation test of nationality for purposes of determining a company's substantive rights under the Treaty.

Sumitomo also cites (Br. 38) a passage in an article by Herman Walker that was relied upon by the court of appeals in this case (Pet. App. 11a) and by the

Fifth Circuit in the *Spiess* case (643 F.2d 353). Walker stated that there is a

> clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus, the acknowledgement of a fact—the existence and legitimate paternity of an association—is not confused with problems associated with the functional rights and activities of alien-bred associations.

Walker, *supra* note 7, 50 Am. J. Int. L. at 383. This passage lends no support whatever to Sumitomo's assertion that Article XXII(3) is concerned only with ensuring the recognition of the legal status of a company. The passage refers to recognition of "status *and* nationality"—to the "existence *and* legitimate paternity" of an association (emphasis added). Thus, in this passage Walker plainly viewed Article XXII(3) as defining a company's nationality by the place of its organization. To be sure, as the Walker article and Sumitomo both note, the establishment of nationality does not in itself create substantive or functional rights. But this is hardly remarkable in a definitional paragraph. As the Walker article states, substantive rights are conferred on companies of either Party *elsewhere* in the Treaty, according to the nationality of the companies as defined in Article XXII(3).

Sumitomo also relies (Br. 20) on a 1976 airgram from the Department of State to the American Embassy in Tokyo. J.A. 157a-158a. For two reasons, however, this document, too, in fact undermines Sumitomo's argument. First, the airgram responded to a telegram from the American Embassy in Tokyo conveying the view of the Ministry of Foreign Affairs of the Japanese Government that a company incorporated in Japan, even though entirely American-owned, is a company of Japan for purposes of the Treaty. J.A. 155a. Second, the State Department's response *agreed* with the Japanese view that a

company has the nationality of the place where it is established. J.A. 158a-159a. The airgram then explained that substantive rights are conferred elsewhere in the Treaty according to the company's nationality. Thus, it pointed out that an American company would have a right under Article VII to manage its Japanese-incorporated subsidiary and that a U.S. national has a right under Article I to enter Japan to direct his investment even though that investment is in the form of a Japanese corporation. J.A. 159a. These descriptions of the Treaty rights of U.S. nationals and companies with respect to their investments in enterprises incorporated in Japan are plainly correct. The passage does not, however, even mention Article VIII(1) of the Treaty, much less suggest that the Japanese corporation, because it was American-owned, could have invoked the privilege afforded by Article VIII(1) to companies of the United States to engage personnel of their choice in Japan. Consequently, the airgram lends no support to Sumitomo's assertion of a reciprocal right in the United States.[10]

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[10] Sumitomo also relies (Br. 37-38) on a passage from a letter sent by Herman Walker to an official of the U.S. Embassy in the Netherlands in 1955 regarding the negotiation of the Treaty of Friendship, Commerce, and Navigation with the Netherlands, Mar. 27, 1956, 8 U.S.T. 2043. See J.A. 288a. The passage concerns a draft proviso prepared by the State Department for possible inclusion in the paragraph of the Dutch Treaty that corresponds to Article XXII(3) of the Japanese Treaty. Under the proviso, which was to be added at the request of the Dutch, controlled companies would have been afforded the same rights as their parents. J.A. 287a-288a. The Dutch apparently found the wording of the proviso unacceptable because they believed it left the impression that Dutch-controlled enterprises in the United States would be unable to claim *greater* protection than their parents where such protection was otherwise available. *Ibid.*

The Dutch eventually withdrew their insistence on a provision of this type, apparently accepting the legitimacy of the concerns of the United States that a general extension of all of the parent's rights to its controlled enterprises might have certain undesirable consequences. J.A. 303a, 305a. Further, they apparently assumed that, even without a provision in the Treaty, a Party, as a matter

It is true, as Sumitomo points out (Br. 38-39), that then-Deputy Legal Adviser Marks of the State Department expressed the view in a 1978 letter to the General Counsel of the EEOC that the Department saw no grounds for distinguishing, for purposes of invoking the Article VIII (1) employment privilege, between Japanese-owned companies incorporated in the United States and unincorporated branches of a Japanese company. J.A. 94a-96a. However, this letter set forth no legal analysis of the question. Moreover, the Department of State changed its view less than a year later, concluding after "an extensive review of the negotiating files on our [FCN treaties], including the 1953 FCN with Japan," that "it was not the intent of the negotiators to cover locally-incorporated subsidiaries [in Article VIII(1)], and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty." J.A. 307a. This remains the position of the United States. The Ministry of Foreign Affairs (MFA) of the Government of Japan takes the same view with specific reference to this case. App. B, *infra*.[11] The views of the contracting

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of domestic law, would not give less favorable treatment to a controlled company than to the parent. *Ibid.*

Thus, the Parties in the Dutch negotiations recognized that the Dutch Treaty, like the Japanese Treaty, provided only certain rights to controlled enterprises and that an extension of greater rights to them would require an amendment. There was, moreover, no reference to the employment right in Article VIII(1) of the Dutch Treaty; the controversy centered instead on property rights covered by another Article. J.A. 280a. This exchange of letters, which occurred more than two years *after* the Japanese Treaty was ratified, therefore concerned a distinct subject matter, a different treaty, and a proposed provision thereof that was not adopted. To the extent it has any relevance here, it corroborates our position rather than Sumitomo's contention.

[11] As the last two documents lodged with the Clerk by respondents show, MFA had expressed the same view informally to the American Embassy in Tokyo in 1979 in connection with this case.

Sumitomo refers (Br. 20) to the brief amicus curiae filed by the Ministry of International Trade and Industry (MITI) of the Government of Japan in this case. The MITI brief does not specifically address the legal question whether Sumitomo is a company

parties on a question of treaty interpretation are entitled to great weight. *Kolovrat* v. *Oregon*, 366 U.S. 187, 194-195 (1961).

Finally, Sumitomo relies (Br. 39-40) on the State Department's administration of the treaty trader section of the INA, under which a Japanese alien may obtain a treaty trader visa to assume a covered position with a company incorporated in the United States if more than 50% of its stock is owned by Japanese nationals. Sumitomo argues that a similar 50% ownership rule should be adopted for purposes of the special employment privilege in Article VIII(1), without regard to the place of incorporation. This argument is misplaced. The regulations establishing the 50% ownership test were adopted by the State Department to implement a provision in an Act of Congress of general applicability that has the specific purpose of permitting the free movement of *individual aliens* to the extent necessary to facilitate trade with the Nation's treaty partners. That statutory provision, the State Department's regulations under it, and the treaty trader provisions of the numerous FCN treaties they implement (see 9 FAM, Pt. II, Exh. 1) do not confer rights on companies or even refer to the distinct employment privilege of companies under a number of the FCN treaties. Nor has Sumitomo cited any evidence that the Parties to the Treaty or the State Department ever considered that the treaty trader and employment privilege Articles of this and other FCN treaties were intended to have the same reach.

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of Japan for purposes of the Treaty. But because MITI's brief might be understood to support Sumitomo's position on this issue, and in order to assist the Court by resolving any resulting confusion regarding the position of the Government of Japan on this issue we requested the State Department to seek clarification from MFA. The February 26, 1982 statement of MFA, reiterating its previous view (App. B, *infra*), is the result of that inquiry. That statement takes the position that MFA is the Office of the Government of Japan responsible for interpretation of the Treaty. It also explains that MFA's position had been made known to MITI, which posed no objection, although the MFA position is not a joint statement of the two Ministries.

Article I of the FCN with Japan, for example, authorizes "[n]ationals of either Party * * * to enter the territories of the other Party and to remain therein * * * for the purpose of carrying on trade between the Parties and engaging in related commercial activities." In contrast to the employment privilege in Article VIII(1), the right of entry in Article I is not limited to persons who will be engaged by nationals or companies of the foreign state. The administrative requirement imposed by the Secretary of State that a company nevertheless must be more than 50% foreign owned in order for an alien of the same nationality to be eligible for a treaty trader visa is simply an appropriate measure to confine the treaty trader right within reasonable limits. It bars foreign nationals from entering this country to work for essentially American concerns without complying with the labor certification and similar requirements designed to protect American jobs. 8 U.S.C. 1101(a)(15)(H) and 1182(a)(14); *Saxbe* v. *Bustos*, 419 U.S. 65, 75-76 (1974). These administrative *limitations* on the scope of the treaty trader provisions of the INA therefore cannot be read implicitly to *broaden* the scope of the special employment privilege in Article VIII(1), which the Parties deliberately confined to employers who are nationals or companies of the foreign state.

The conclusion that a corporation such as Sumitomo cannot avail itself of the special employment privilege in Article VIII(1) does not mean, of course, that Japanese nationals cannot be employed in Sumitomo under any circumstances. Some Japanese nationals may be permitted to enter the United States under the treaty trader and investor provisions in Article I of the Treaty and Section 1101(a)(15)(E) of the INA. In addition, because Sumitomo's parent corporation apparently is a company of Japan, the parent might well have discretion protected by the Treaty to select Japanese nationals for certain top-level managerial positions in Sumitomo through the exercise of the parent's right under Article VIII(1) to engage "executive personnel" of its choice in

the United States to the extent necessary to effectuate its right under Article VII(1) to "control and manage" Sumitomo. Because the court of appeals held that Sumitomo itself is a company of Japan for purposes of Article VIII(1), that court did not consider what rights, if any, Sumitomo's parent corporation might have under that Article with regard to positions in Sumitomo.[12] These and other matters may be considered by the district court on remand.[13]

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[12] The record is not yet sufficiently developed to permit an analysis of this issue, in part because it is not clear what role Sumitomo's parent actually played in its employment decisions. Counsel for Sumitomo stated in an affidavit filed with the motion to dismiss in the district court that Sumitomo's parent corporation had assigned "many" Japanese nationals to it. J.A. 74a. However, an affidavit of counsel is not a substitute for a record on this point, and even that affidavit does not indicate how many employees were so assigned or which positions they occupy.

Although we have not yet reached a final conclusion on the question, it could be argued that the parent's right to engage Japanese nationals in connection with the operations of its U.S. subsidiary is limited to the category of "executive personnel" mentioned in Article VIII(1) of the Treaty, whose functions reasonably could be said to be essential to effectuate the parent's Article VII(1) right to "control and manage" the subsidiary; understood in this manner, the parent's rights would not necessarily extend in full force to the other categories of personnel mentioned in Article VIII(1) who, although perhaps highly qualified technicians, would not be responsible for directing Sumitomo's operations. Because respondents apparently all are present or former clerical personnel, it seems unlikely that they would qualify for or could be trained within a reasonable time to occupy the sorts of "executive" (top-level management) positions to which the parent's Article VIII(1) Treaty right would attach under this view.

[13] Another issue that would have to be addressed on remand is the interaction between Title VII and the treaty trader provisions of the INA. As explained above, under the treaty trader regulations, a person may be admitted only to occupy a top-level management position with a trading firm or to occupy another position with such a firm if he is a specialist who is truly essential to the firm's operations in the United States. We have considerable doubt that these standards, properly applied, would cover the full range of respondent's managerial and sales positions at issue in this suit,

III. ON THE PRESENT RECORD, THE COURT SHOULD NOT IN ANY EVENT REACH THE ISSUE OF THE PRECISE RELATIONSHIP BETWEEN ARTICLE VIII(1) AND TITLE VII

If the Court disagrees with our submission above and concludes that a Japanese-owned company incorporated in the United States is a company of Japan that may invoke the special employment privilege in Article VIII(1), a question then arises concerning the relationship between that employment privilege and Title VII. The district court did not consider this issue or certify it for interlocutory appeal, but the court of appeals nevertheless proceeded to decide it. For a number of reasons, we suggest that this Court refrain from doing likewise

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and it is not clear that respondent intends to assert that all of these positions are or even could be occupied by persons holding treaty trader visas. Counsel stated in his affidavit only that "many" of Sumitomo's employees have treaty trader visas. J.A. 74a.

If the treaty trader standards are correctly applied, they would probably be entirely consistent with the requirements of Title VII in the vast majority of cases. It might well be, for example, that a company could demonstrate a business necessity under Title VII standards for requiring that top-level management in a Japanese-owned trading firm be familiar with Japanese custom, language, culture, and business practices. In lower level positions, the treaty trader requirement that the alien have special skills that are not available in the United States and are essential to the effective performance of the company's business similarly would tend to justify the selection of Japanese nationals under Title VII standards.

Of course, issuance of a treaty trader visa to an alien, based on the determination by a consular officer stationed in Japan regarding the need for a Japanese national to occupy a particular position in the United States, does not immunize a Japanese-owned employer from a Title VII claim pertaining to that position. The consular officer cannot (and does not purport to) make the type of thorough inquiry into the company's employment practices that a court would make in a Title VII suit. However, the court in a Title VII suit would not have jurisdiction to review the propriety of issuing the visa or to direct the deportation of an alien. Those are matters within the exclusive jurisdiction of the State Department and the Immigration and Naturalization Service (8 U.S.C. 1103(a), 1104(a) and 1252), although an order of deportation is subject to judicial review pursuant to 8 U.S.C. 1105a.

and instead remand for further proceedings on this issue if it concludes that Sumitomo is a company of Japan for purposes of Article VIII(1).

A. The court of appeals understood Sumitomo to argue that Article VIII(1) carves out an *exemption* from Title VII for foreign-owned employers with respect to their selection of personnel in the categories mentioned in that Article. Pet. App. 3a, 13a. The court of appeals rejected this contention, concluding that Article VIII(1) "does not give [Japanese firms] license to violate American laws prohibiting discrimination in employment" (Pet. App. 13a) and noting that Sumitomo's "broad interpretation" might also immunize a Japanese firm from laws prohibiting the employment of children or granting rights to unions and employees (*id.* at 14a).

In this Court, Sumitomo now concedes that it is subject to Title VII in filling its executive positions. Br. 14; but cf. *id.* at 29-30. We agree with this concession. The definition of the terms "employer" and "employee" in 42 U.S.C. 2000e(b) and (f) contain no exceptions for an employer in the United States that is foreign-owned or for certain employees of such an employer, whether citizens or aliens. Cf. 42 U.S.C. 2000e-1; *Espinoza* v. *Farah Manufacturing Co.*, *supra*, 414 U.S. at 95. Moreover, if Article VIII(1) of the Treaty limited the application of Title VII in a case such as this, it would do so only to the extent of permitting a company of Japan to take Japanese citizenship or nationality into account in filling the enumerated positions, not to immunize selections based on sex, religion, race or even national origin, as such.[14]

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[14] This is clear from the background of Article VIII(1). Article VIII(1) was drafted against the background of "percentile" restrictions that required American companies operating abroad to hire a certain percentage of their work force from the host country's labor force. Restrictions of this kind inhibited investment abroad because they prevented American companies from hiring those individuals in whom they had the most confidence. By the same token, a number of States in this country had laws restricting or banning employment of aliens. The purpose of Article VIII(1) was to override these percentile restrictions so that American businesses operating abroad would be able to select U.S. nationals for

Sumitomo now concedes this as well. Br. 14. Sumitomo also eschews any interpretation of the Treaty that would exempt it from domestic labor legislation generally. Br. 27. The courts below did not have the benefits of Sumitomo's narrower focus.

B. We also cannot endorse the manner in which the court of appeals attempted to reconcile the employment privilege in Article VIII(1) and Title VII—by reliance upon the BFOQ exception in 42 U.S.C. 2000e-2(e). Sumitomo does not argue in this Court that it has selected employees on the basis of Japanese *national origin*; it argues that it has selected them on the basis of Japanese *citizenship*. Br. 14-18. If the district court so finds on remand, the BFOQ exception in 42 U.S.C. 2000e-2(e), which is intended for situations in which the employer explicitly selects specifically on the basis of national origin (*Dothard* v. *Rawlinson*, 433 U.S. 321, 332-333 (1977)), would appear to be inapplicable. The issue then would be whether Sumitomo's selection of Japanese nationals—what it now describes as a citizenship requirement—has the *effect* of discriminating impermissibly on the basis of national origin.[15] The appro-

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essential positions. See Note, *Commercial Treaties and the American Civil Rights Laws*, 31 Stan. L. Rev. 947, 952-953 & n.28 (1979). Thus, as explained by Herman Walker, Article VIII(1) confers a right to hire executive and technical personnel "regardless of their nationality, without legal interference from percentile restrictions and the like." Walker, *Treaties for Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 234 (1956); see also J.A. 182a. The Executive Report submitting the Japanese Treaty to the Senate similarly stated, with respect to Article VIII(1), that "laws regarding the nationality of employees are not to prevent such nationals and companies from carrying on their activities in connection with the planning and operation of the specific enterprises with which they are connected." S. Exec. Rep. No. 5, 82 Cong., 1st Sess. 3-4 (1953). See also *Commercial Treaties: Hearings Before the Subcomm. of the House Comm. on Foreign Relations*, 83d Cong., 1st Sess. 9 (1953) (referring to a right to hire executive and technical personnel "regardless of nationality").

[15] The complaint can, of course, be read to allege intentional discrimination specifically on the basis of national origin. If that

priate defense to a facially permissible employment practice that has a discriminatory impact is that of business necessity, not BFOQ. *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425-436 (1975); *Griggs* v. *Duke Power Co.*, *supra*. The question on remand therefore would be whether a citizenship preference that has the effect of selecting persons on the basis of their national origin can be defended on the ground that the citizenship preference has "a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971). Analysis of that question should include consideration of whether Article VIII(1) itself constitutes a legislative-type validation (as a "business necessity") of a citizenship preference (at least for the top-level "executive" positions mentioned in that Article) that excuses a company of Japan from showing the job relatedness of a citizenship preference on a case-by-case basis.[16]

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were shown, the BFOQ exception might then be invoked by Sumitomo. However, even then we would have serious reservations about the court of appeals' formulation of the BFOQ exception in this setting. Most of the factors cited by that court in its BFOQ analysis are not inextricably intertwined with a person's national origin as such, but instead are aspects of an expertise that could readily be acquired by persons *not* of Japanese national origin —— *e.g.*, knowledge of Japanese products, markets, and business practices, and familiarity with the parent enterprise. Pet. App. 15a. The unsuitability of BFOQ analysis here is further illustrated by the fact that it might permit Sumitomo to prefer U.S. citizens of Japanese national origin over other U.S. citizens, even if they have no specific knowledge of the factors just listed. We also are troubled by the court of appeals' suggestion that Japanese national origin might be a BFOQ because employees of Japanese national origin might be more acceptable to persons with whom the company does business. Pet. App. 15a. This would not ordinarily be a legitimate reason to select employees on the very bases that are prohibited by Title VII. *Fernandez* v. *Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981); cf. 29 C.F.R. 1604.2(a)(2).

[16] As we explain (see note 18, *infra*), it is not clear that any of Sumitomo's employees would fall in any of the other categories of personnel enumerated in Article VIII(1), and, indeed, the only one even mentioned by Sumitomo is that of "specialists." These other categories of personnel might be distinguish-

C. However, we believe the Court should not reach the question of the interaction of Article VIII(1) employment and Title VII because it is presented largely in the abstract in the current posture of this case. Because the decisions below were rendered in connection with Sumitomo's motion to dismiss for failure to state a claim, the record has not yet been developed and no findings have been made with respect to a broad range of matters that should inform a reasoned decision of this issue.

The matters that remain unresolved at this point include: (1) the responsibilities of and any special qualifications required for the various executive, management, and sales positions that respondents allege have been filled by Sumitomo on a discriminatory basis; (2) the manner in which persons have been selected for these positions; (3) how many of these persons are Japanese nationals; (4) the circumstances of the admission under the immigration laws of those who are Japanese nationals; (5) how many of these previously were employed by Sumitomo's parent company in Japan; (6) the

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able from "executive personnel" for present purposes in any event. Article VII(1) of the Treaty gives nationals and companies of Japan the right to "control and manage" their enterprises in the United States, and it could be argued that the discretion to select top-level "executive personnel" in whom the nationals and companies have confidence is a necessary component of that right. For other categories of personnel enumerated in Article VIII(1), however, it could be argued that the principal concern underlying that Article is to ensure free access to *qualified* persons. The treaty trader regulations ordinarily would require a showing that such an alien has special qualifications not available in the American labor market in any event. Moreover, the second sentence of Article VIII(1) makes clear that in the ordinary case, professionals entering on treaty trader visas are not exempt from domestic laws regarding licensing and other requirements. This might suggest that, even if a company of Japan had largely unfettered discretion to select Japanese nationals to fill "executive" positions, it would not be inconsistent with the purposes of Article VIII(1) to subject employment practices affecting other positions enumerated in Article VIII(1) to scrutiny under the "business necessity" standard of domestic civil rights laws.

degree to which the selection of these or other Japanese nationals working for Sumitomo has been made, or the personnel paid, by Sumitomo's parent corporation in Japan; (7) the extent to which, for Title VII purposes, the pool of potential applicants for some or all of the various positions in question would include a significant number of Japanese nationals in any event because of the particular qualifications for the position; (8) the responsibilities and qualifications of the white males and any other non-Japanese nationals, if any, who have been hired for the positions in issue (see J.A. 61a, 67a); (9) which of the positions could be said to be truly "executive" in nature, such that they would fall within the coverage of the particular Article VIII(1) privilege that Sumitomo principally asserts (see Br. i, 20, 25, 30) and the court of appeals discussed (Pet. App. 13a-15a) to select "*executive* personnel * * * of [its] choice" (emphasis added);[17] and (10) which, if any, of the positions

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[17] At some places in its brief, Sumitomo uses the term "managerial" interchangeably with "executive" or lumps "supervisory" positions with "executive" ones. See Br. 9, 23, 26, 27, 29, 41. However, the term "executive" as used in Article VIII(1) cannot be read to embrace all personnel who might be said to have some managerial or supervisory functions, as Sumitomo implies. That term connotes only top-level management officials who are responsible for making policy and directing the firm's affairs and whose services therefore can be thought to be necessary to effectuate the Article VII(1) right of a Japanese-owned corporation to "*control* and manage" its operations (emphasis added).

This relatively limited scope of the category of "executive personnel" mentioned in Article VIII(1) of the Treaty is consistent with the administration of the treaty trader section of the INA. The treaty trader regulations, which (unlike Article VIII(1)) refer to both executive and supervisory positions, nevertheless make clear that only top-level management positions are covered. See pages 3-6, *supra*. Because any Japanese nationals who would occupy the "executive" positions mentioned in Article VIII(1) presumably must be admitted to the United States under the treaty trader (or investor) provisions of the INA, the Article VIII(1) category of "executive personnel" must, be limited to top level management.

Even Sumitomo's own answers to interrogatories in district court do not characterize all positions at issue here as "executive" in

referred to in respondents' complaint would fall within any of the other categories of personnel enumerated in Article VIII(1), to the extent Sumitomo so contends.[18]

On the present record, then, it is not clear how many and in what positions Japanese nationals are employed by Sumitomo or to what extent and in what manner Sumitomo's true business requirements and the policies of the Treaty, Title VII, and the immigration laws actually are implicated by its employment practices. Cf. *Minnick* v. *California Department of Corrections*, No. 79-1213 (June 1, 1981), slip op. 18-22; *id.* at 1 (Brennan, J., concurring in the judgment). We therefore suggest that if the Court concludes that Sumitomo is a company of Japan for purposes of the Treaty, the Court should not decide on the present record the difficult and sensitive issue of first impression regarding the interaction of Article VIII(1) of the Treaty and Title VII.[19]

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nature. Only the positions of General Manager, Assistant General Manager, and (in some cases) Department Manager are placed in that category. J.A. 40a. Similarly, Sumitomo's EEO-1 forms for 1975 and 1976 state that 30 employees in the New York offices were "Officials and managers." The remainder of the positions at issue in those offices were classified as "Professionals" or "Sales workers." J.A. 61a, 67a.

[18] Although the question presented by Sumitomo in its brief (at i) mentions only the category of "executive" personnel, Sumitomo refers at several places in the body of its brief (at 10, 14, 20) to the category of "other specialists" mentioned in Article VIII(1). It is not clear, however, which (if any) of its employees Sumitomo suggests might fall in this category. In context, moreover, it seems clear that the term "specialists" in Article VIII(1) refers to persons with a particular professional or equivalent training such that their unique expertise is essential to the effective operation of the company. Mere supervisory, lower-level management, and sales personnel, for example, would not appear to fall in this category, as Sumitomo perhaps intends to argue in this case.

[19] There is, for example, little basis under the Treaty for distinguishing a U.S.-incorporated subsidiary established at the outset by and integrated with a parent trading company in Japan, such as Sumitomo, from an on-going, wholly U.S.-owned corporation serving the domestic U.S. market that is purchased by a Japanese company.

That issue, with its potentially broad implications for the Nation's foreign relations and international trade and investment under this and other similar treaties (see App. C, *infra*) should, in our view, be resolved only in a concrete factual setting.

CONCLUSION

The judgment of the court of appeals should be reversed on the ground that Sumitomo is not a company of Japan for purposes of the Treaty, including Article VIII(1), and the case should be remanded for further proceedings. If the Court concludes that Sumitomo is a company of Japan, the judgment of the court of appeals should be vacated insofar as it holds that Article VIII(1) of the Treaty and Title VII of the Civil Rights Act are to be reconciled through the BFOQ exception in 42 U.S.C. 2000e-2(e), and this aspect of the case should be remanded for further proceedings to develop a factual record.

Respectfully submitted.

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